No. 10945

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

APPELLANTS' CLOSING BRIEF

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ARGUMENT

From an examination of Appellee's brief, it is clear that they have not desired to meet the issues presented in this case for, rather than to discuss the point of law raised by the District Court, they have chosen to inject into the case new issues and points not considered or pointed out by the District Judge in his decision. The Judge overruled the objections of debtor which were argued before him as to the admissibility of certain affidavits and ordered them filed and considered. Then the District Judge found that the action of the Commissioner rejecting any consideration of a cash offer of the Petitioner of $10,000.00 for the

property was erroneous and showed that the issue of value had not been competently tried and determined.

Thus, we have the question presented in simple form SHOULD AN OFFER OF PURCHASE BE ADMITTED AND CONSIDERED BY THE COURT?

We do not intend to take up the time of the court by arguing the right of the District Court to receive additional evidence for that is now elemental, but it is our contention that such evidence should be admissible and proper evidence. Let us here consider the Affidavit of L. A. Turner which was admitted by the District Judge over the objection of counsel, remembering that this was an affidavit which counsel had no right or opportunity to cross-examine the maker as to the alleged facts therein set forth. At the close of the affidavit the affiant said:

"That your affiant would be willing, upon the expectation of reselling said property immediately at a considerable profit, to offer at this time the sum of $9,000.00 cash for the immediate purchase of said property, and herewith make such an offer." Tr. 38.

This is the type of evidence that Appellee is insisting on injecting into this case and at its best can only be considered to be an offer to purchase, yet it is not phrased in such language that it is a definite or unconditional offer.

Under the provisions of Par. 3 of subsec. (s) of Section 75 of the Bankruptcy Act the debtor is the sole person who can buy the property and, therefore, any one bidding can do so without fear of having his offer or bid accepted. Certainly such a condition would not encourage legitimate offers and we are constrained to feel that the court will agree with the law so ably set out in Sharp vs. U. S. 191, U. S. 341, in which the court declined to permit the

consideration of offers of purchase, stating that they did not tend to show value, they were unsatisfactory, easy of fabrication and even dangerous in their character as evidence. This case was mentioned heretofore and cited in our Opening Brief.

Again, may we repeat that if such evidence is admitted, then a hearing to determine value, might well disintegrate into an auction sale with all kinds of offers being made and yet no one bidding, having any fear that his offer can be accepted, for the debtor under the law has the sole right to buy the property at the value so fixed.

The case of Kauk vs. Anderson, 137 F(2d) 233 does not deal with any offer of purchase but merely authorizes and approves the receiving of evidence of recent sales of farms similar to the farm in suit. And nowhere in that case do we find any facts or law dealing with the question of the admissibility of a cash offer for the farm under consideration. The case of Kauk vs. Anderson is one that departs somewhat from the established law in the State of California, for, in that State, evidence of other sales is only admissible when asked upon cross-examination for the purpose of testing the witness' knowledge and impeaching his opinion and not for the purpose of fixing the value of the land in dispute. Reclamation District vs. Inglin, 31 Cal. App. 495 at 500, Spring Valley W.W. vs. Drinkhouse 92 Cal. 528, at 532, 10 Cal. Jur. p. 364.

It is to be noted throughout the transcript that the Commissioner time and time again permitted evidence of other sales to be admitted, for we find in examining the Witness, Charles Aubrey, these questions:

Q. Now, are you familiar with any sales in the general locality within the past six months?

A. There was one place sold directly on the East side of this property, before I appraised in 1943, for $2,100.00, a five (5) acre piece sold to Mr. Hinkle. Tr. 60.

Q. Do you know what you sold it for?

A. Somewhere around $4,500.00. Tr. 61.

Q. Within the last six months have you made any inquiry in the general locality of the Wumkes Grove as to any sales?

A. Yes, I have made some inquiry.

Q. Did you learn of any sales in the locality within a radius of two miles of the Wumkes Grove?

A. No. Tr. 60.

Again, a similar question was asked of the Witness, J. W. Mehl:

Q. In appraising this property, did you inquire as to whether there had been any sales in that locality?

A. I did not. Tr. 70.

The Witness, Johnson, was asked on cross-examination:

Q. Have you sold any citrus property in this general locality within the last six months?

A. No.

Q. Have you had any listed for sale?

A. No.

Q. How near would you say the nearest grove that you had listed for sale was with respect to this property?

A. Oh, probably a mile and one-half or two miles.

Q. How many acres are there in that piece?

A. Five acres.

Q. What was it listed with you at?

A. I sold it for $5,500.00. Tr. 86.

And then Appellee's counsel went into all of the details of that sale, and again Appellee's counsel asked the

same witness, W. H. Johnson:

Q. Were there any sales that you know of?

A. Yes, the adjoining property to Wumkes, to the East, was sold.

Q. How many acres was that? A. 5 acres.

Q. What did that sell for? A. $4,500.00.

Q. Did you know of any other property?

A. Fifteen acres sold across the street from this grove.

Q. What did that sell for? A. $9,000.00.

Q. Did you know of any other property that was sold? Tr. 89.

And again, Appellee's counsel asked many questions covering the value and the sales of this nearby property?

Thus, clearly we note that evidence of other sales was admitted and considered by the Commissioner in his decision.

DISCUSSION OF APPELLEE'S POINTS

Appellee's counsel has first argued the right of the District Court to permit the introduction of new evidence and, as we have heretofore said, we have no quarrel with that right providing the new evidence is admissible and proper.

Secondly, Appellee has attempted to inject new points of error not raised in or decided by the District Court, which he contends indicate a miscarriage of justice had occurred. Most of these deal with the admissibility of offers of purchase and, without the citation of any legal authority, he brands each ruling as error. When the Witness, Aubrey, testified that an offer of $10,000.00 would not affect his appraisal, counsel immediately cites that as error and yet was not the witness right, for his appraisal is fixed by what he thinks, after considering all

of the facts, the property to be reasonably worth. And this the witness indicates when he testified "I would not be at all surprised to hear of that being offered, but that is no sign I think it is worth it." Tr. 62. Certainly the witness has the right to weigh in his mind the various factors and from them to determine what in his opinion was a reasonable fair market value. It is quite possible that he felt the same way as Mr. Mehl did when he was asked,

Q. If there was a ready buyer for this property for $10,000.00 cash, would that affect your appraisal, if you knew that that offer was being made?

A. I think the man would be crazy. Tr. 69.

But Mr. Mehl went on further to testify:

Q. In the event you knew there were three offers to purchase with various purchasers on a cash basis between $9,000.00 and $10,000.00 for this property, would that affect your appraisal?

A. Naturally, it would.

Again counsel criticizes the referee for ruling out a hypothetical question which clearly did not state all of the material facts to be embraced in the question, and again no authority is given for his conclusion that it is error, and we submit that certainly such an objection was proper. Appellee's Brief, Page 10:

Q. Assuming that the fruit on this packing house net returns on this property brought the neighborhood of $5,000.00 this year; that is, the 1943-1944 season, would that affect your appraisal?

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial and asking for a conclusion of this witness as to what were the net returns. Is there anything taken out for pruning, fertilizing or upkeep?

Mr. Nichols: I am not bringing that into the question. I say the net packing house returns.

Mr. Duffy: You are assuming that certain things are done?

Mr. Nichols: That is right.

Mr. Duffy: Then you are asking him to fix the value on an assumption as to what might be the returns.

Mr. Nichols: No, it is a hypothetical question if the net returns received from the packing house were $5,000.00 on this property, would that affect or have any effect upon Mr. Mehl's appraisal of this property?

Objections sustained. Tr. 71-72.

Appellee's counsel, in his brief, then goes out of the record to state that the production cost and even the bankrupts' fees have been paid, which is incorrect and certainly, even if it had been true, those elements should have been embraced in the propounding of such a hypothetical question.

Again, it was pointed out by Appellee as error, that the Commissioner admitted certain photographs which were used before at the prior valuation hearing and were included in the record on appeal at that time, and although the witness testified that he knew of no change. See Tr. 75-77. Counsel states that such was error but again cites no authority.

CONCLUSION

Counsel for Appellee apparently has fellen into that failing of so many advocates that when a ruling is made against him, although he admits that the error is not conclusive. See Page 16 of Appellee's Brief, and cites no authority, yet he immediately charges the referee with bias

and lack of impartiality. We submit that a reading of the transcript readily shows that the Commissioner conducted himself in a judicial manner and ruled upon the evidence justly and fairly. The District Judge did not find that a fair hearing had not been accorded but confined his decision to the discussion of the alleged error of law committed by the Commissioner in refusing to consider evidence of other sales of comparable property and particularly in failing to consider the cash offer of $10,000.00. Let us not be led far afield by these new issues injected by Appellee and forget the real issues as raised by the District Judge.

The question of the admissibility of offers to purchase is the question that the District Court determined and such a question will without a doubt arise again in this and other cases unless it is determined once and for all by this case.

It is our contention that such evidence is not admissible and that the District Court erred in admitting and considering such evidence and erred in vacating and setting aside the ruling of the Commissioner because the Commissioner refused to permit the introduction of an offer to purchase said property, which said offer could not by its very nature be accepted and which the Commissioner found that by reason of the law and the testimony of the witnesses that said offer was based upon pure speculation and was to purchase said property for a particular purpose; and further found that the element of good faith in said offer was very questionable. Tr. 26.

The function of the District Judge, in reviewing the determination of the Conciliation Commissioner, is to ascertain:

1. Whether a fair hearing was accorded;

2. Whether all competent evidence offered was received and considered;

3. Whether any incompetent evidence was received and relied upon;

4. Whether there was substantial competent evidence to support the determination;

5. Whether it is contrary to the clear weight of all of the competent evidence adduced. Dunsdon vs. Federal Land Bank, St. Paul, 137 Fed. (2d) 84.

The District Judge here merely decided that the Commissioner-Referee prejudicially erred in failing to consider other sales and particularly in failing to consider evidence of a cash offer, and upon that error of law reversed the case after considering the affidavits introduced.

If the District Judge erred in admitting these offers of purchase and the Commissioner properly excluded the offers of purchase, then it should follow that the decision of the District Court should be reversed and the decision of the Commissioner upheld, for that was the only criticism that the District Judge made of the Commissioner's decision.

Certainly from a factual viewpoint it is to be noted that the witnesses produced on behalf of the Debtor Powell were men of high standing and ability, that their appraisals are not out of line with even the reported sales, for Mr. Aubrey testified that one adjoining five acre piece sold for $4,500.00. Tr. 61, and Mr. Johnson testified to selling another five acre piece in close proximity for $5,500.00. Tr. 86. And again testified to selling fifteen acres across the street for $19,000.00. Tr. 89.

Thus clearly do we feel that the decision of the Com-

missioner is upheld by the evidence and that the District Judge may not try the issue de novo upon the records and substitute his judgment of value for that of the Conciliation Commissioner. Dunsdon vs. Federal Land Bank, St. Paul, Supra.

We, therefore, respectfully submit that the decision of the Commissioner should be upheld.

Respectfully submited,

H. R. Griffin,

Attorney for Appellant.